FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 13 1947
CHARLES ELMORE CROPLEY
CLERK

156

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 924

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

MARQUETTE CEMENT MANUFACTURING COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

EDWARD A. ZIMMERMAN,
H. W. NORMAN,
W. R. ENGELHARDT,
Counsel for Marquette Cement Manufacturing Company.

SUBJECT INDEX.

	PAGE
Statement	2
Questions Presented	13
Question No. 1	13
Question No. 2	17
Question No. 3	18
Should the Writ of Certiorari be Granted?	20
I.	20
II.	26
III.	26

TABLE OF CASES.

Cement Manufacturers' Protective Association v. United States, 268 U. S. 588 4

Corn Products Refining Co. v. Federal Trade Commission, 324 U. S. 726, 732, 736-737 ..... 5, 19

Federal Trade Commission v. Goodyear Tire & Rubber Co., 304 U. S. 257, 101 F. (2d) 620, 625 (C. C. A. 6, 1939) 22

Federal Trade Commission v. Staley Manufacturing Co., 324 U. S. 746, 759-760 (1945) 19

Louisville & N. R. Co. v. Sloss-Sheffield S. & I. Co., 269 U. S. 217, 237-8 21

Samuel H. Moss, Inc. v. Federal Trade Commission, 148 F. (2d) 378 (C. C. A. 2, 1945); certiorari denied October 8, 1945, 90 L. ed. (adv. op.) 41 19

U. S. v. International Harvester Co., 274 U. S. 693, 708 21

STATUTES CITED.

Expediting Act as amended, 15 U. S. C. Supp. V. 28-29. 24

Federal Trade Commission Act, Sec. 5, 15 U. S. C. Sec. 45, 52 Stat. 111; Sec. 6(c) (d), (e), 15 U. S. C. A. Sec. 46, 38 Stat. 721; Sec. 7, 15 U. S. C. A. Sec. 47, 38 Stat. 722 2

Federal Trade Commission Act, Sections 11 and 5(e); 15 U. S. C., Sections 51 and 45 (e) 24

Sherman Antitrust Act, Sec. 4; 15 U. S. C. Sec. 4; 26 Stat. 209 2

Transportation Act—Government Traffic, Chapter 573; Public Law 256; 49 U. S. C. Supp. V. Sec. 65, 59 Stat. 606 10

MISCELLANEOUS AUTHORITIES.

Hearings before the Committee on Interstate Commerce—U. S. Senate, 74th Congress, 2nd Session on S. 4055, Marquette's Exhibit 20, p. 309. 23

Reports of the Federal Trade Commission:

"Annual Report" (1935), Marq. Ex. 9, p. 147.... 20

"The Cement Industry" (1933), Marq. Ex. 17, p. xii 11

"Price Bases Inquiry—The Basing Point Formula & Cement Prices" (1932), Marq. Ex. 16, pp. 28-29 7

"Resale Price Maintenance" p. lxi, December 13 1945 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 924.

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

MARQUETTE CEMENT MANUFACTURING COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

Now comes Marquette Cement Manufacturing Company and respectfully submits that the petition of the Acting Solicitor General for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Seventh Circuit entered in this cause should be denied for the following reasons:

1. The "Questions Presented" do not state issues determined by the Court below.

2. The Petition fails to show special or important reasons for allowing the writ.

3. The decision below is not in probable conflict with any applicable decision of this Court.

4. The case does not present any question of Federal law of general importance which has not been, but should be, settled by this Court.

5. Public interest will not be served by granting the writ.

STATEMENT.

The Petition is by the Solicitor General, an officer of the Department of Justice, which is charged with the duty of enforcing the Sherman Antitrust Act[1], on behalf of a government bureau, or administrative agency, called the Federal Trade Commission. This Commission was created by Congress with certain specified powers.[2]

This agency, now claiming to share with the Department of Justice the function of enforcing the Antitrust Laws,[3] issued a Complaint against The Cement Institute, and as members thereof 75 of the American manufacturers of portland cement, charging them in two counts with a combination to restrain competition in the sale of cement through agreement to employ "what is known as a multiple basing-point system of pricing" under which "all cement is sold only at delivered prices" and, pursuant to this alleged conspiracy, with agreeing to employ various other specified marketing methods.

Count I is entitled, "Charge Under the Federal Trade Commission Act." Count II is exactly the same as Count I as to allegations of fact (with a single minor addition[4]) and the charge of combination. It differs from Count I only in being entitled, "The Charge Under the Clayton

1. Sherman Antitrust Act, Sec. 4, 15 U. S. C. Sec. 4, 26 Stat. 209.

2. Federal Trade Commission Act, Sec 5, 15 U. S. C. 45, 52 Stat. 111; Sec. 6 (c), (d), (e), 15 U. S. C. 46, 38 Stat. 721; Sec. 7, 15 U. S. C. 47, 38 Stat. 722.

3. Report of the Federal Trade Commission on Resale Price Maintenance, p. lxi, December 13, 1945.

4. "• • • a difference in delivered price of only one cent (1¢) a barrel will deflect business away from one manufacturer to another." (Complaint Count II, Par. 8, R. 241.)

Act," and in reciting as an additional alleged "effect" of the "combination" that the delivered prices charged and collected by cement producers are not the "true prices" because they include the cost of delivery, and it adds that, in order to derive the "true price," the amount paid to the carrier for transportation of the cement to the buyer must be deducted from the delivered price. (Count II, Par. Six, R. 223.)

Because there is a difference in these "true prices" derived in accordance with the Commission's formula, it is concluded in Count II that the result is a violation of Section 2 of the Clayton Act, as Amended by the Robinson-Patman Act. Incidentally, the phenomenon described may occur whenever a cement producer seeks to make a sale in a market area where some competitor is located closer freight-costwise to that market. Having a freight rate advantage, the competitor makes a lower delivered price. In such a situation the more distant plant must lower its delivered price by the amount of the difference in transportation costs between the competing plants and the market in order to meet the lower price of the competitor,—or forego the business.

In the exercise of its statutory powers, the Department of Justice between August, 1919, and March, 1922, instituted a series of eight related proceedings charging combination in restraint of trade in violation of the Sherman Antitrust Act and involving the entire portland cement industry, including 75 corporate producers of cement, 100 individuals, and also involving the Association of American Portland Cement Manufacturers, a national association, and five district associations, including the Ce-

ment Manufacturers' Protective Association.[5] One of these cases, an equity proceeding entitled *U. S. A.* v. *Cement Manufacturers' Protective Association* in the Southern District of New York, was treated as a representative case, and the other pending proceedings were held in abeyance. That case was decided by this Court in 1925 contrary to the contentions of the Government. (*Cement Manufacturers' Protective Association* v. *U. S.*, 268 U. S. 588). This is the case that is cited and referred to in the Opinion below as the "Old Cement Case." The other pending cases were thereafter dismissed as controlled by that decision of this Court.

In further exercise of its statutory powers, the Department of Justice on June 28, 1945, filed another proceeding under Section 4 of the Sherman Act charging violation of the Sherman Antitrust Act, against all of the respondents in the instant case, including The Cement Institute, and naming 14 additional defendants, charging combination and conspiracy, originating in 1902 and continuing to the date of the Complaint, to eliminate competition and to discriminate in price by agreement to use and actual use of the same marketing methods and pricing practices and involving all of the trade associations that were cov-

5. The cases constituting this series are entitled as follows:

U. S. A. v. *The Atlas Portland Cement Company, et al.*, D. C. N. J. Equity, No. 2274 (August 13, 1919);

U. S. A. v. *Alpha Portland Cement Company, et al.*, S. D. N. Y. Law No. C-27-272 (March 1, 1921);

U. S. A. v. *Cement Manufacturers' Protective Association, et al.*, S. D. N. Y. Equity, No. 22/25 (June 30, 1921);

U. S. A. v. *The Atlas Portland Cement Company, et al.*, S. D. N. Y., Law, No. 29-49 (August 8, 1921);

U. S. A. v. *Mid-West Credit & Statistical Bureau, et al.*, N. D. Ill. Equity, No. 2392 (October 24, 1921);

U. S. A. v. *Hiram Norcross, et al.*, W. D. Mo. Equity No. 302 (October 25, 1921);

U. S. A. v. *The Cement Securities Company, et al.*, D. C. Colorado, Equity, No. 7295 (January, 1922);

U. S. A. v. *Lehigh Portland Cement Company, et al.*, N. D. Ill.,

ered in the Old Cement Case and that are alleged in the Complaint and referred to in the Findings in the instant case, and praying for a restraining order substantially the same as the restraining order in the instant case. That proceeding is still pending. (*U. S. A.* v. *Cement Institute et al.*, D. C. Col. Equity No. 1291.)

The Petition herein on Page 6 sets forth an abstract of "Count two" which is incorrect. The charge of unlawful discrimination is not based upon differences in delivered prices that are not accounted for by the differences in the cost of transportation as in the *Corn Products* Case.[6]

Having tried the contested issues, the Commission issued its "Findings as to the Facts" and "Order," restraining the respondents from "continuing * * * or carrying out any * * * agreement, combination, or conspiracy" (R. 16,135) to do certain specified acts. (R. 16,135-7.) This order the Court below set aside.

At the bottom of page 7 of the Petition it is asserted that, "The Opinion of the Court below is severely critical of the reasoning of the Commission," and in footnote 4 a few samples of the "severe" expressions are offered with appropriate references to the record. We urge examination of the record pages referred to. Such examination will discover that the apparently pungent expressions of the writer of the Opinion are actually masterpieces of understatement. Which of the odd, indefinite and unintelligible arguments and "Findings," upon which the Court below had to pass, is the most "illogical," incomprehensible and "absurd," is a matter of personal opinion. Where the Commission makes the rather ridiculous Finding 22(c) which reads, "It is concluded that, in the circumstances present in this proceeding, the recognized principle of economics that uniformity of price tends to result from free competition in the case of a standardized article sold

6. *Corn Products Refining Co., et al.* v. *Federal Trade Com-*

to well-informed buyers does not serve to explain the identical delivered prices of respondents in the offering for sale and sale of cement," (See Opinion R. 16,804) the Court below says:

> "The Commission attempts to escape the devastating effect of the application of this recognized theory by arguing that 'dealers, who are the backbone of the industry, are not well enough informed to know that the so-called standard cement is not a homogenous product and that there are substantial differences in the quality of such cement.' Here again the Commission's contention is directly in conflict with the views expressed in the old Cement Case. Furthermore, we are of the view that it borders on the absurd to argue that buyers of cement will not pay more for one brand than another because of their ignorance as to its character and quality. * * * Is it within the realm of possibility that dealers, contractors, engineers and others experienced in the use of cement would be unaware of a difference in quality which would make one brand more desirable than another?"
>
> "The Commission, however, has made a finding upon which this escape argument is predicated. Finding 20(h) states, 'In general, dealers and ordinary purchasers are not aware of differences in quality among the brands of cement sold by different producers. The possession of such knowledge by these groups would tend toward making it impossible for respondents to maintain uniform prices for cement.' While the Commission refers to this finding at numerous points in its brief, it nowhere cites any evidence in its support."
>
> "Respondents assert there is none, and call our attention to what they contend is the only relevant evidence in the record. * * * A dealer witness testified that he was aware of the variations in strength of different brands of cement but even so he would not pay a penny more for one than another. * * * The Commission stipulated that 'if other dealer witnesses were called they would give their testimony to the same effect.' * * * We must conclude not only that the finding is without support but that it contradicts the only evidence on the subject." (R. 16,805-6.)

How intelligent, or absurd, it is, may be further highlighted by observing that, in adducing evidence on the sub-

ject and making such arguments and findings as above, the Commission was attempting to refute its own statement in the Complaint in the instant case. The Complaint states:

> "Cement is a standard commodity, made in standardized specifications, not differing substantially among producers in quality except as between recognized and standardized grades thereof".[7]

Beginning about the middle of page 8 and extending just through the middle of page 13 the Petition purports "to summarize the facts as found by the Commission." 128 lines of reading matter presumably cover all the salient points in "Findings" which cover 170 pages in the printed record. The job is remarkable for what it omits. The Opinion of the Court below is much more thorough and enlightening. It merits and will reward an analytical examination. Such an examination will demonstrate that the assertion on page 13 of the Petition that, "The Court below does not clearly state the grounds upon which it set aside the Commission's Order" is wrong.

The summary omits any reference to the findings and restrictive admissions that show that the Commission abandoned its original charges of an industry-wide combination and conspiracy that originated prior to the organ-

---

7. The Complaint, Par. Three R. 41. See also the Commission's report entitled, "Price Bases Inquiry—The Basing-point Formula and Cement Prices," (1932) wherein it said:

> "Standard portland cement is an example of a commodity that not only can be closely graded and accurately tested for quality, but is practically uniform in quality for all producers. While there are brands, as there are in sugar and salt, upon which extensive advertising campaigns are based, * * * it is generally true of the product that for all common purposes cement is cement and it matters little to the consumer whose product is purchased, provided price and other terms of sale are alike. Dealers are also on record * * * that there is no substantial difference between the brands of standard portland cement or if there is a difference, it is so slight that no brand can be sold at a premium over another." (Marq. Ex. 16, pp. 28-29.)

ization of the Institute, late in 1929. It omits the affirmative findings that show that it also abandoned any attempt to prove or find the agreements by the organized industry upon which plants were to be "basing-points" and which "non-basing points," what figures were to be used as "basing-point prices," and agreement to adopt delivered prices and to refuse to sell f.o.b. plant.

> "There is no agreement * * * as to whether a respondent shall operate a base or non-base mill." (Opinion below, R. 16,786.)
>
> "There is no exchange of price information between the respondents." (Opinion below, R. 16,785.)
>
> "There is no finding of a refusal on the part of respondents to sell on an f.o.b. mill basis; in fact, the record discloses that many of them did so." (Opinion below, R. 16,812; see also R. 16,766 and 16,786.)
>
> "In many of such findings it is plainly disclosed that some of the petitioners were pursuing one course and others a directly opposite course." (Opinion below, R. 16,784.)

The few selections chosen "to summarize the facts as found by the Commission" do not show the attenuated remains of the original wide-sweeping case that was no doubt designed to eclipse the decision of this Court in the old Cement Case which "The Commission * * * contends was wrong." (Opinion, R. 16,810.) Nothing of that brash plan remains. The Commission shrunk its case to a charge of a combination originating with the Institute, carried out through the Institute and proved by mere membership in the Institute.

> "The Commission states: 'Each of the corporate petitioners (respondents) * * * for a substantial period of time, directly associated itself with and constituted a part of the combination through membership in the Institute.' At another point: 'The conspiracy charged was against the Institute and its members. It is

what they did during the existence of the Institute that constituted the conspiracy and the order to cease and desist is directed only against those things.' Referring to the Institute, the Commission further states: 'It is the chief common bond which united them, the common purpose which is the core of every conspiracy.' Again the Commission states: 'The findings as to their Institute membership are sufficient to make them responsible for the Institute's program.' (See R. 16,767.)

The Opinion of the Court beginning with the title, "The Cement Institute" (R. 16,769)

thoroughly analyzes findings 1(a) to (z), 2(a) to 2(z), 3(a) to 3(z), 4(a), 7(o), 7(p), 12(c), 8(d), 8(h), 8(m), 8(n) and 13(a), and includes any and every finding that could be relied upon to support the alleged Institute theory of conspiracy and one step at a time completely demolishes it. (R. 16,769 through the first few lines of R. 16,773.)

The Court below follows its analysis of the findings relating to the Institute with a conclusion that is fatal to the Commission's shrunken theory of combination through the instrumentality of the Institute, as follows:

> "The Commission does not find that any pricing practice of the industry generally or that any pricing practice or policy of any respondent was developed or changed by or through membership in the Institute or by or through any act of the Institute. Most important of all perhaps is that there is no finding that the Institute either had or exercised any power or authority or could or did impose any restriction upon the activities of its members." (R. 16,772-3.)

Of all the considerable number of pertinent Findings discussed by the Court below, as shown above, only three are mentioned in the Solicitor General's "summarization," and those Fdgs. 8(h), 8(m) and 8(n) relate to the brief period of time when the Institute freight rate bureau

collected and distributed information on land grant rates —a subject matter now thoroughly dead and laid to rest— not only because the experiment was discontinued before the Complaint but because the Congress by An Act to amend the Transportation Act, with respect to the movement of Government traffic, approved December 12, 1945, discontinued land grant rates on Government property.[8]

The summary does not disclose the basis and scope of Finding 6(a), cited on page 10 of the Petition as supporting an evil-sounding statement, beginning on page 9, that "The members of the industry have, by understandings and agreements, developed and maintained substantial uniformity of action with respect to practically every marketing procedure involving price or other competition," and that, "Some of the current practices which are designated as 'customs of the trade,' originated in agreements made many years earlier." It is based upon old records beginning with the Association of American Portland Cement Manufacturers' Association and upon "agreements entered into as long as 20 to 30 years ago." (R. 15,984.) (Certainly, long before the Institute was organized in 1929.) This finding itself shows the disunity amongst respondents by dividing them into four classes. (Opinion, R. 16,773.)

The analysis of this finding in the opinion of the Court below gives a typical example of the utterly fuzzy uncertainty of the Commission's "Findings." The Opinion quotes from the finding a passage as follows:

> "Some of the respondents have been parties to substantially all of these activities; other respondents have participated in a lesser degree, or fully or partially for shorter periods of time; other respondents have been mere followers, adopting and supporting the practices of their more active associates; and a

8. Transportation Act—Government Traffic, Chapter 573, Public Law 256, 49 U. S. C. Supp. V. § 65, 59 Stat. 606.

few respondents have from time to time, for various reasons participated only reluctantly in some of the practices, and have occasionally opposed for a time particular instances of group action."

Of this the Court below said:

"No attempt is made here or elsewhere to classify the various respondents or the particular practices in which they have participated or the period of such participation." (R. 16,773.)

Finding 7(h) fixes the date of the beginning of delivered prices in the cement industry as 1901 and 1902 (R. 15,991-2) and Finding 7(i) (R. 15,992) refers to the time when the multiple basing-point evolved and quotes from minutes of the American Association of Portland Cement Manufacturers held in December, 1904.[9]

At page 11 the summary states that "Respondents have engaged in many kinds of collective action with the effect and purpose of preventing departure or deviation from their pricing system," and further asserts that the action *thus taken* includes nine specified items. The charge in the Complaint is that these things were done pursuant to the conspiracy charged in Paragraph Four. The Commission did not so find. The supposed "collective action" set forth on Pages 11 to 13 of the Petition has no support in the Findings which themselves show the diversity of conduct among the respondents. The opinion of the Court below makes this clear. (R. 16,809, 16,802, 16,784, 16,773; see also R. 16,772 re Finding 8(d).)

Even as to the three items of evidence held incompetent, the Court shows that they furnish no basis for the charge

9. A report of the Commission to the U. S. Senate, entitled "The Cement Industry," in 1933 stated:

"For about thirty years portland cement manufacturers have used what is known as the multiple basing-point method of quoting delivered prices." (Marquette Exhibit 17, p. xii.)

of conspiracy. For example, as to the N. R. A. Code evidence, the Court stated:

> "If it reveals anything it is the great divergence of opinion which existed between members of this industry. It was with difficulty that many of them were persuaded to agree to what was proposed and done in connection with the Code. In fact, some never did agree. They were a queer lot of conspirators." (R. 16,777; as to the other evidence, see R. 16,773-6 and R. 16,780.)

QUESTIONS PRESENTED.

1.

Question No. 1 is premature. It imposes a false issue. It by-passes and ignores the primary contested issue stated by the Court below, "Whether the Commission has found that the respondents have entered into a nation-wide conspiracy, as charged * * *"; (R. 16,763; see also Abstract of the Complaint by the Court below, R. 16,762).

Furthermore, the Commission did not make any such finding as that assumed in Question No. 1. That the Commission did not make findings of "The Combination Alleged in its Complaint" is adequately covered by the Opinion of the Court below. (R. 16,770-16,784, inclusive.) The findings show affirmatively that *agreements* which are essential to "what is known as a multiple basing point system," under which all cement is sold only at delivered prices, were not found in the cement industry. These elements are agreement by the organized industry upon the number and location of so-called "basing-point mills" and "non-basing-point mills," and agreement upon "basing-point prices." As to the first, the Opinion states,

> "5. There is no agreement either through the Institute or otherwise as to whether a respondent shall operate a base or nonbase mill. Finding 7(b) states: 'The number and identity of base and nonbase mills change from time to time. A base mill may, for reasons its management considers sufficient, become a nonbase mill, and similarly a nonbase mill may become a base mill'." (R. 16,786; see also R. 16,799.)

As to the second, the Court below points out,

> "2. There is no exchange of price information between the respondents either through the Institute or otherwise. Finding 9(e) states: 'Except to the extent that the dissemination of delivered prices dur-

ing the NRA Code period and some seven months thereafter necessarily carried with it an exchange of base prices, and except for limited direct exchanges among certain respondents which the record does not show to have been made under the auspices of the Institute, there has been no systematic exchange among the corporate respondents of basing-point prices or changes in such prices'."

"3. Likewise, there is no proof or finding of any exchange of information or any agreement among respondents concerning the price f.o.b. mill." (R. 16,785.)

Even the agreement to sell only at delivered prices, or its corollary, to refuse to sell at an f.o.b. plant price which is included in Question 1, is not supported in the Findings of the Commission:

"7. There is no finding of an agreement among respondents of a refusal to sell at an f.o.b. plant price." (Opinion, R. 16,786.)

All cement was not sold on a delivered price basis:

"In the instant case, there is no finding of a refusal on the part of respondents to sell on an f.o.b. mill basis; in fact, the record discloses that many of them did so." (R. 16,812; see also R. 16,766.)[10]

---

10. The Commission could not have disputed that there were literally millions of barrels of cement upon which various respondents quoted and sold the Government at f.o.b. plant prices every year for ten years preceding the filing of the Complaint as this was clearly demonstrated by many of its own exhibits.

Some examples of f.o.b. mill bids of Marquette and other companies, shown in U. S. Government abstracts:

COMMISSION'S EXHIBITS.

765 A-F	766 A-D	767 A-B	182 A	769	
771	183 B	772	773	774	770
775	776	185 A	186 E	777 A-B	184 H
779	780	781	782	783	778
785	786	787	788	789	784
791	792 A, B	793	794	192	790
796	397	398 A-E	187 A	188 E	795
193	166	401	171 A-C		165

Commission's Witness Rice, Tr. 3,505-43, R. 1,663-79.

The opinion of the Court below demonstrates beyond dispute the absence of any such collusive system of pricing in the cement industry (R. 16,799 through 16,800; see also the analytical discussion of the Court below of the hypothetical illustration offered by the Commission in Finding 7(g), R. 16,789, *et seq.*). The Commission fairly admits that there can be no "basing-point *System*" without the *recognition* of the "base mills" as price leaders (R. 16,801). But since any mill, as the Commission finds, is free at any time to become a base mill, no semblance remains of the elements of agreement essential to the collusive "system" which the Commission set out to prove was employed through the industry-wide combination charged in the Complaint. All of this, of course, is merely by way of saying that the decision of this Court in the Old Cement Case was correct in that the Government in that proceeding failed to prove the elements of agreement essential to show violation of the Sherman Antitrust Act.

The opinion of this Court in the *Staley Case* in 1945, long after the close of evidence in 1940 in this case, has rendered obsolete the "non-base mill" with its adherence to the price bases of the cement producers who establish their own prices, and with its so-called "phantom freight." (See opinion below, R. 16,814-15.) Unless the management of some so-called "non-base mill" is unaware of the effect of the decision in the *Staley Case*, there are today no "non-base mills" in the cement industry. Such a change from "non-base" to "base" mill is for each mill an independent act, not part of any conspiracy (Finding 7(b), R. 15,989; see also Opinion, R. 16,799).

The last clause of Question 1 erroneously assumes a constant identity in delivered prices. This is a false assumption not borne out either by the Findings or the Record. Finding 6 (c), R. 15,987, is the grudging and meager admission by the Commission that prices are not always

identical. There was no dispute of the truth of the proposition that during the period when price changes are attempted by any producer, there will be variations in quotations of delivered prices by competitors. This is shown by the Commission's own exhibits and witnesses.[11] There was no dispute of the truth of the proposition that leads and lags in price quotations are followed by a final leveling out at any market place and that this is not a phenomenon peculiar to cement, but that it occurs with other building materials.[12]

In addition to the common variations which occur at the time of price changes, the record of testimony of the Commission's witnesses showed frequent price cuts to contractors and dealers.[13]

In addition there were many instances of attempted price leads which were not followed by competitors, with the result that the would-be price leader was compelled to abandon the attempted increase to meet the lower competitive prices which it found in the field.[14]

---

11. This is shown by comparison of Commission's Exhibits 2,268-9-70 with 2,286; 2,273 with 2,306; 2,275 with 2,303; 2,276 with 2,298. See also Commission's Exhibits 1,121-J-K-M; Resp. Ex. 85; Commission's Witnesses: Neylan, Tr. 6,263-4, R. 2,563-4; Wing, Tr. 8,159-60, R. 3,102-3, Capen, Tr. 12,703, R. 4,457-8; Tr. 12,716, R. 4,464; Royal, Tr. 19,540, R. 6,186.

12. Commission's Witness Ray, Material Dealer, R. 3,003-4, Tr. 7,856, Commission's Witness Admiral Peoples, Head of the Procurement Division of the U. S. Government, R. 3,757-8, Tr. 10,324.

13. Commission's Witnesses: Neylan, Tr. 6,242, R. 2,557; Dankel, Tr. 11,336, R. 4,040-1; Tr. 11,342, R. 4,043; Tr. 11,353-4, R. 4,047-8; Affleck, Tr. 13,045, R. 4,558; Hill, Tr. 13,296-7, R. 4,648; Royal, Tr. 19,622-4, R. 6,191.

14. Commission's Witnesses: Neylan, Tr. 6,263-4, R. 2,563-4; Wing, Tr. 8,159-60, R. 3,102-3; Royal, Tr. 19,540, R. 6,186.

2.

Question No. 2 poses two separate entirely unrelated questions, each of which by-passes the primary issue, and assumes that Findings were made by the Commission which were not in fact made. Therefore, a false issue is posed. It does not appear from the Findings made that the respondents did act collectively as the question assumes. As to these various practices, the Court below found:

> "These methods and acts, *as found by the Commission*, were employed by groups of respondents, some by one group and some another. None, so far as we are aware, was used by all." (Opinion below, R. 16,809, italics ours.)

The freight rate book "was never used by many of the respondents." (Opinion below, R. 16,809.)

As to involuntary or punitive bases:

> "There is no finding that they were imposed as the result of agreement among the respondents." (Opinion below, R. 16,802.)

As to f.o.b. mill sales:

> "Some was sold on an f.o.b. mill basis and the Commission made no finding of a refusal on the part of respondents to sell on the latter basis." (R. 16,766.)

Since the Findings themselves did not disclose the *collective action* assumed by petitioner, the Court below necessarily held that the Commission could not,

> rely upon what was done by one group at a certain time and place and by some other group at another time and place in support of the charge of conspiracy." (Opinion below, R. 16,814; see also R. 16,808.)

The second section of the question, "Whether a reviewing court may, on the basis of its own independent

appraisal of the evidence, reject the Commission's Finding of combination," not only assumes a Finding which was not made, but also ignores the uncertainty and the indefinite, incomplete character of the "Findings." The opinion of the Court below develops this as the following references show. (R. 16,770, 16,773, Finding 6(a); 16,782, 16,784, 16,787, Finding 7(a); 16,788, Finding 7(g); 16,805 *re* Finding 22(c), *e.g.*, "We think the statements contained in this Finding are so argumentative and inconsistent as to be entitled to little, if any, weight as a Finding of Fact;" 16,805-6 *re* Finding 20(h) which though it is not supported by any evidence, as the Court holds, is directly contrary to the allegations in the Complaint (Complaint, R. 41 and R. 241); R. 16,809, Finding 8(g) *re* freight rate books.)

The question also ignores the failure of the Findings to support the charge of an industry-wide combination and agreement, as pointed out by the Court below. (R. 16,771, 16,772-3-4-5-6, 16,785-6, 16,787, Finding 7(b); 16,789 Finding 7(h); 16,790, 16,791, 16,792, 16,794 to 16,797, inclusive, 16,798, 16,799, 16,800—basing-point system not adopted by agreement of the respondents; 16,802-3, Finding 10(a); 16,804, Finding 22(c); 16,806-7 *re* Finding 9, (here the Court below explains the unreality of a far-fetched inference of collusion where sealed bids on a Government project were identical, to the seventh decimal point); 16,807-8, Finding 9(e), R. 16,810.)

3.

Question No. 3 includes two separate and distinct questions. The first is based upon the Commission's theory of variable "mill nets" and the Commission's theory of "true price." Definition of price as "'mill net,' as charged in the Complaint (R. 223), was found necessary in 1943 by the Commission (Finding 24(a), (b), R. 16,127-8; Opinion below, R. 16,762). This fanciful theory was there-

after in 1945 thoroughly exploded by this Court in *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726, at pp. 736-737 (1945). The question ignores the inseparable charge of combination and conspiracy. That alleged combination is the only thing the Commission's Order purports to restrain. Therefore, this section of Question No. 3 is improper as going beyond the scope of the Complaint and the Order.

The second section of Question No. 3 again involves the definition of "true price" set forth in Count II of the Complaint (R. 16,761-2). It also apparently presents a novel concept, namely, that "to meet an equally low price of a competitor," a seller must undercut such price (c.f. *Federal Trade Commission* v. *Staley Manufacturing Co.*, 324 U. S. 746, at pp. 759-760 (1945); *Samuel H. Moss, Inc. v. Federal Trade Commission*, 148 Fed. (2d) 378 (C. C. A. 2, 1945), certiorari denied, October 8, 1945, 90 L. ed. (adv. op.) 41). The basic and inseparable question of combination is again ignored. Furthermore, this question, just as the preceding one, goes beyond the scope of the Complaint and the Order and presents a false issue. Both of the questions are moot.

SHOULD THE WRIT OF CERTIORARI BE GRANTED?

I.

The primary reason urged for granting the writ is based upon the assertion that the Cement Industry is being conducted "without any vestige of price competition." Offering such an extravagant and baseless statement as the foundation for the allowance of the Petition leaves the prayer without support. It is common knowledge that cement is currently marketed in practically the same manner as it has been since its manufacture became a substantial American industry nearly fifty years ago. During that period its methods of pricing and marketing have been thoroughly investigated and have been pronounced free from any such charge by the opinion of this Court in the Old Cement Case. That opinion has been quoted with approval by this Court in cases too numerous to list. We add the able opinion of the Court below and a special report of the Federal Trade Commission two years before it issued its Complaint.[15]

This Court applied "common sense and the realities" in the Old Cement Case, pointing out that a seller must lower his price in a territory contiguous freightwise to a competitor's base mill "*in order to compete in that territory*" (R. 16,800). Such following of a competitor's price

15. Pursuant to Section 6(d) of the Trade Commission Act, the Senate in 1931 instructed the Commission to investigate competitive conditions in the cement industry to determine the existence of unfair trade practices or violations of the Antitrust Laws. The Commission's Final Report concluded with the Finding that: "The investigation revealed no evidence of monopoly." (Annual Report, Federal Trade Commission, (1935), p. 147, Marquette Exhibit 9.)

was held by this Court, in *United States* v. *International Harvester Co.*, 274 U. S. 693, 708, "does not establish any suppression of competition" (R. 16,801). Justice Brandeis said: "When a seller enters a competitive market with a standard article, he must meet offerings from other sources." *Louisville & N. R. Co.* v. *Sloss-Sheffield, S. & I. Co.*, 269 U. S. 217, 237-8.[16]

The next reason advanced, the size of the record and the duration of the proceedings, is equally worthless. The size of the record is merely typical of the tendency of administrative agencies that are not bound by any rules of evidence. In the instant case, the record is overstuffed with testimony and exhibits relating to matters that were fully covered by the Old Cement Case, and many of the exhibits were obtained from the files of the Department of Justice assembled for the purpose of the trial in the old proceedings (R. 16,775; Tr. 28,114-28,133, R. 8,314-8,324). The lack of any sort of reasonable limit upon what the record should include is illustrated by one of the Commission's exhibits, "The Masquerade of Monopoly," a book by one of the Commission's staff of economists and "expert" witnesses, which contains a tirade against this Court for its decisions in the Old Cement Case and other proceedings.

At Page 16 the Petition suggests as a reason for granting the petition that this case is likely to set the pattern for the application of the Clayton Act to other industries. We understand from this that the Commission is inviting this Court to approve the pattern adopted by the Commission in Count II of the Complaint in the instant case.

Count II depends upon two separate bits of legislation

16. Judge Evans, dissenting, nevertheless agrees that "absorption" of freight in order to meet competition is not necessarily illegal. From the remainder of the dissent it appears very unfortunate that Judge Evans became seriously ill on the first day of the argument and was thereby prevented from further participation in the hearing.

on the part of the Trade Commission. First, the Commission adds to Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, a definition of price which the Commission in 1936 unsuccessfully sought to have Congress include in the amendment.

The second bit of legislation by the Commission is attempted through the device of entitling Count II, "The Charge Under the Clayton Act," and, immediately following the title, repeating the charge of industry-wide combination and agreement contained in the first five paragraphs of Count I (R. 218). The Commission artfully *assumes* that Section 2 of the Clayton Act includes an inhibition against a combination and conspiracy which results in a discrimination in price.

By these means the Commission attempts to evolve a novel pattern of procedure that, if permitted, will enable it to proceed *en masse* against entire industries for alleged price discrimination. What does it matter that Congress has refused to put its stamp of approval upon the Commission's pattern of procedure if the doctrine of "acquiescence" will in time make everything all right? We respectfully suggest that the pattern provided by Congress in the Clayton Act as amended and as heretofore followed by the Commission should be adhered to, as denial of the writ prayed will insure—at least for the present.

This Court and a Court of Appeals has had occasion to correct the Trade Commission's previous effort to interpret the Clayton Act as the Commission believed it ought to be rather than as the Congress had enacted it.[17] When the Commission issued the Complaint in the instant case containing its unauthorized attempt to create this new pattern of procedure, it did not have before it the Opinion of this Court in the *Corn Products* Case.

17. *Federal Trade Commission* v. *Goodyear Tire and Rubber Co.*, 304 U. S. 257, 101 F. 2d 620, 625, C. C. A. 6 (1939).

The final proof of the Commission's attempt to create an entirely new "pattern" is to be found in the unique form of the Commission's restraining order. This order does not restrain any individual cement manufacturer from discriminating in prices charged or collected from its customers. The order only purports to restrain any combination or conspiracy to do certain specified things (R. 16,135). Among these things is Paragraph 3 which specifies "discriminating in price * * * by *systematically* charging and accepting mill net prices which differ by the amounts necessary to produce *delivered costs* to purchasers identical with *delivered costs* available to such purchasers through purchases from other respondents" (R. 16,137). This strange language which substitutes "delivered costs" for the everyday term "delivered prices" does not conform to the type of order which should issue to prevent violations of Section 2 of the Clayton Act as amended by the Robinson-Patman Act. What it actually amounts to is an adroit effort on the part of the Trade Commission to bring about the same results that would have been accomplished had the Congress actually adopted the proposed bill "To Prevent Uniform Delivered Prices," sometimes called the Anti-Basing-Point Bill (S. 4055, Seventy-Fourth Congress), the passage of which was unsuccessfully advocated by the Commission in 1936. (Hearings before the Committee on Interstate Commerce in U. S. Senate, 74th Congress, 2nd Session on S. 4055, p. 309; Marquette's Exhibit 20.)

We quite agree with the Solicitor General's statement near the bottom of page 16 of the Petition that the instant case, "Is far removed from the usual proceedings under the Federal Trade Commission Act to stop a particular concern from using a trade name or trade practices believed to be misleading or otherwise unfair," and we also agree with the further statement that, "The substantive

issues are substantially those which arise in an equity proceeding by the United States to enforce the Sherman Act, which issues Congress has deemed to be of such importance that direct appeal should lie to this court." The reference made in the footnote on page 17 to the "Expediting Act as amended, 15 U. S. C.; Supp. V. 28, 29" cannot be relied upon to support this petition. It may be pertinent to some extent as a reason for not allowing the writ. Perhaps it was upon the theory set forth in the characterization of the instant case made by the Solicitor General, as quoted above, that a motion was presented to the District Court of Colorado on behalf of certain respondents to suspend further proceedings in that case until the final disposition of the proceedings in the Trade Commission case. The motion was resisted by the Department of Justice on the ground that certain sections of the Trade Commission Act made it apparent that nothing that could occur in the Trade Commission proceedings could control or prevent further proceeding by the Department of Justice in the Denver case. The sections referred to were Section 11 and the last sentence of Section 5(c) of the Trade Commission Act. (15 U. S. C. Sections 51 and 45(c).) Perhaps the Department of Justice was right in its contention; at least the District Court so held in overruling the motion for stay.

It may not be very material in the situation now before this Court whether the Department of Justice was or was not right on this technical question of law. It is apparent that the instant case as the Commission has limited it to an alleged combination centered in the Institute, as hereinbefore pointed out,[18] covers only a very small part of the whole picture presented by the Denver Case. True, both actions involve an alleged conspiracy in restraint of trade, that is, a violation of the Sherman Antitrust Act. Both actions involve the same old pricing and marketing methods in the portland cement industry. However, the

18. See pages 7 through 9, *supra*.

District Court Case involves not only the Cement Institute and the seven other earlier trade associations but every American cement producer with the exception of the Permanente Company and the plant owned by the State of South Dakota. It involves a period of time not only from late 1929, when the Institute was organized, to July, 1937, when the Commission issued its Complaint, but the entire period during which delivered prices have been the common practice in the cement industry, from 1902 to June, 1945. The charges of agreement in the Denver proceeding cover every element originally charged in the Trade Commission Case or that might have been included under that charge, including agreement by the organized industry upon "basing-point" mills," "non-basing point mills," and "basing-point prices," agreement to sell only at delivered prices, and agreement to refuse to sell at f.o.b. plant prices, whereas, the Commission's Findings in the instant case are to the contrary.

As the Solicitor General points out in the Petition herein, the statute applicable to the Colorado proceeding provides for direct appeal by either side to this Court. No Petition for Certiorari is necessary. The point has been raised in the Denver Case that it is in the interest of the public that there should be an end to litigation and that that proceeding is an open attempt to retry the issues settled by the Old Cement Case. Whatever the decision in that case may be, it seems certain that it will eventually come before this Court. The same principle, that it is in the public interest that there be an end to litigation, also contemplated that there should be some limit to the burdens placed upon the facilities of this Court. That was the very purpose of the amendment to the Judiciary Act which required Petitions for Certiorari and made it possible for this Court to screen out those cases which would not be final and decisive.

Perhaps the office of the Attorney General, which now presents the Petition for Writ of Certiorari, after study of the Commission's "findings" and Order, reached the same conclusion about the instant case as later reached by the Court below in 1946.

II.

The cases cited in the Petition under Point II do not support Petitioner's assertion that the decision below is in probable conflict with applicable decisions of this Court.

III.

The synthetic questions of law set forth in the closing section of the Petition are based upon the legislative efforts of the Commission in its fanciful construction of Count II. They do not present any question of Federal law of general importance. They do not present any new or important *interpretation* of Section 2 of the Clayton Act. They attempt to emasculate Section 2(b) of the Clayton Act and otherwise to supplement it in a manner not provided by Congress. The Opinions of this Court in the *Corn Products* and *Staley Cases* provide all the means necessary for the Trade Commission to proceed against the few, if any, remaining concerns that may be operating as so-called "non-base" plants. By following the method provided by statute, the Commission will find it unnecessary to import any charge of "combination" or any definition of "true price."

Respectfully submitted,

EDWARD A. ZIMMERMAN,
H. W. NORMAN,
W. R. ENGELHARDT,
Counsel for Marquette Cement Manufacturing Company.

February 13, 1947.